(2)

No. 02-1149

Supreme Court, U.S.
FILED
MAY 29 2003
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; and the CITY OF NEW YORK,

Petitioners,

- v. -

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, AND SANDRA JONES, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

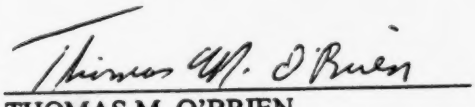
TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES

21 pp

Respondent Valerie Krimstock asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari and to proceed in this case in forma pauperis. In both the District Court and the Court of Appeals, Respondents were allowed to proceed as poor persons and were represented by The Legal Aid Society of the City of New York. Respondent Valerie Krimstock's affidavit in support of this application is attached.

Dated: Brooklyn, New York
May 29, 2003

Respectfully submitted,



THOMAS M. O'BRIEN

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(718) 243-6806
Counsel for Respondents

No. 02-1149

IN THE
SUPREME COURT OF THE UNITED STATES

Raymond KELLY, et al. - Petitioners

v.

Valerie KRIMSTOCK, et al. - Respondents

AFFIDAVIT IN SUPPORT OF A MOTION TO PROCEED *IN FORMA PAUPERIS* UPON AN OPPOSITION TO A TO A PETITION FOR A WRIT OF CERTIORARI

STATE OF PENNSYLVANIA)
)SS:
COUNTY OF ALLEGHENY)

I, Valerie Krimstock, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am Respondent in this case.

2. I am unable to pay the costs of this case or to give security.

3. The Respondents were previously granted leave to proceed *in forma pauperis* in the United States District Court for the Southern District of New York on December 14, 1999. We were represented by the Legal Aid Society of New York City.

4. I further swear that the responses which I have made to the questions and instructions below relating to my ability to

pay the cost of proceeding in this Court are true.

5. I am currently employed as a medical records technician at the Oncology Hematology Association of Pittsburgh, where I earn approximately $19,000/yr.

6. Within the past twelve months, I have not received any other income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources.

7. I have no savings account and a small checking account.

8. I own no real estate, stocks, bonds, notes or other valuable property, excluding household furnishings and clothing. I drive a 1995 car.

9. There are no persons who are currently dependent on me for support.

10. I declare under penalty of perjury that the foregoing is true and correct.

Valerie Krimstock
VALERIE KRIMSTOCK

Duly witnessed and
sworn to before me
a Notary Public, this
19 day of May, 2003

Notarial Seal
Sharon E. Garvin, Notary Public
Bellevue Boro, Allegheny County
My Commission Expires July 13, 2004
Member, Pennsylvania Association of Notaries

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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May 29, 2003

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should grant Certiorari to review a ruling of the Second Circuit that individuals whose cars have been seized and impounded by the police for allegedly being used in the commission of a crime have a right under the Fourth and Fourteenth Amendments to a prompt post-seizure opportunity to be heard to challenge the probable validity of the seizure and the necessity of the impoundment of the car for the duration of a civil forfeiture action initiated by the Police Department.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this Brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The synopsis of the lower court proceedings presented in the Petition is accurate. Respondents provide this brief summary in order to supply a more informative factual context, which is necessary to an understanding of the proper legal issues at this stage of the case.

Respondents are vehicle owners whose cars were seized by Petitioner New York City Police Department in March, April, and May, 1999. Six of the Respondents were charged with the crime of Driving While Intoxicated (DWI). None had ever been arrested before. The seventh, Sandra Jones, was not charged with any crime; her estranged husband, who had borrowed the car, was charged with gun and drug possession.

Each seized car was transferred to the police pound within days of arrest. Between three weeks and two months later, Petitioner Property Clerk of the New York City Police Department commenced civil lawsuits seeking forfeiture of each vehicle, pursuant to the local Administrative Code allowing the police to keep any property that was "used" in the commission of a "crime." The Police Department had regularly impounded cars on the allegation that they were used in the crimes of drug or gun possession, or solicitation of prostitution. The program was dramatically expanded in February, 1999, when the police announced that they would seize and impound any vehicle that was driven by a person arrested for DWI.

When the instant case was filed in December 1999, all of Respondents' cars remained in the police pound. Seven to nine months had passed since the original seizures. Each criminal case had concluded months before. The six Respondents who had been charged with DWI had pleaded to the lesser offense of Driving While Ability Impaired, which is a violation, not a crime. See

Vehicle and Traffic Law §1192(1). The gun and drug charges against Ms. Jones's husband had been dismissed.

Under the local law, there was no procedure available to challenge the impoundment of a vehicle pending a prospective or actual forfeiture action. Respondents brought this class action to obtain a declaratory judgment that due process required a prompt hearing after seizure at which the vehicle owner could challenge the legitimacy and the necessity of the impoundment of his or her car throughout the life of the forfeiture proceeding.

Respondents made no challenge with respect to the timeliness of the forfeiture actions brought against them. They did not contest the 25-day time limit within which local rules permit the police to institute a forfeiture action, nor did they challenge the length of time it took to conclude the forfeiture action in their cases. The purpose of the federal lawsuit was to obtain a meaningful procedural opportunity to challenge the impoundment of a vehicle pendente lite.

The Second Circuit agreed with Respondents that "their inability to challenge, promptly after the vehicles are seized, the legitimacy of and justification for the City's retention of the vehicles prior to judgment in any civil forfeiture proceeding violates their constitutional rights." (Petition at A3)

The ruling did not restrict the ability of the police to seize vehicles. Nor did it impose a different time limit for the police to institute a forfeiture action, or to prosecute the forfeiture case. The decision's "primary focus," rather, was the "continued retention" of vehicles after the original seizure and before the conclusion of the forfeiture action: "It is this intermediate deprivation, lasting months or sometimes years without any prompt hearing before a neutral fact-finder, that we deem constitutionally infirm." (Petition at A10)

The decision took note of the deprivations experienced by some Respondents. Respondent Sandra Jones, who had not been arrested or charged with any crime, suffered ten months' deprivation before the Property Clerk returned her van. During that period, she had continued to make $428.06 in monthly payments on her impounded vehicle. Valerie Krimstock did not achieve return of her car until 15 months after seizure, when a judge dismissed the forfeiture case. She had continued to make monthly payments of $273 during the impoundment period. The car of Clarence Walter was not released until he prevailed in his forfeiture case more than two years after the car was seized. (Petition at A7-8) Yet none of these individuals had had an opportunity to challenge the prolonged impoundment of their vehicles pendente lite.

Accordingly, the Court of Appeals decided that, since "[a] car or truck is often central to a person's livelihood or daily activities," a person whose vehicle is impounded "must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation pendente lite are available and appropriate." (Petition at A3) "We reach this conclusion," the Court noted, "in light of the dictates of the Fourth and Fourteenth Amendments." (Petition at A10)

REASONS FOR DENYING THE WRIT

A. No Meaningful Conflict Among Appellate Courts

There is no meaningful conflict in the Circuits on the issue decided by the Second Circuit in this case: the right to an early hearing to challenge police impoundment of a vehicle for the life

of a forfeiture lawsuit. With one exception, none of the cases cited by Petitioners addresses this issue. (Petition at 14-15) As the parenthetical descriptions in the Petition make plain, all those cases involve Barker v. Wingo speedy trial challenges to the delays in initiating the forfeiture proceedings. The issue of the post-seizure retention of the vehicle pendente lite was simply not present in those cases.

The sole exception is Jones v. Takaki, 38 F.3d 321 (7th Cir. 1994). In that case, the vehicle owners sought a preliminary determination of probable cause. Dismissing their argument, the opinion stated that "the forfeiture proceeding itself" was "the only hearing to which they are constitutionally entitled." Id. at 324. As authority for that proposition, the Court noted: "We need look no further than the Supreme Court's decision in United States v. Von Neumann...." Id. (emphasis supplied)

The "We need look no further" admission indicates the fatal flaw in the opinion. The panel did not consider this Court's decision in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), which had been issued the previous year. In that case, of course, this Court upheld the due process right to a preliminary hearing to challenge the seizure of property in a forfeiture action. The decision cited Von Neumann, noting that a preseizure hearing is not required for an automobile seized at the border. Id. at 57. By implication, a prompt post-seizure hearing would be required, since the Court stressed that any forfeiture action coming many months later would be too late to redress the harm caused by an erroneous seizure. Id at 56.

In any case, the Jones v. Takaki panel's failure to address the key Supreme Court case on the preliminary hearing issue disqualifies that decision from exemplifying a Circuit conflict. James

Daniel Good plainly looms over this case, as the Petition's devotion of two pages in an attempt to distinguish it demonstrates. (Petition at 22-3) As of yet, the Krimstock case is the only decision of a Circuit court to rule on the issue of a post-seizure hearing in a vehicle forfeiture context in light of James Daniel Good. The Jones v. Takaki panel simply missed the key case. In the absence of any conflict in the Circuits on the applicability of James Daniel Good in the vehicle forfeiture setting, it would be premature and unnecessary for this Court to rule on the issue.

In addition to the absence of a genuine conflict in the Circuits, no New York appellate court has ruled on the post-seizure issue presented here. Petitioners cite Property Clerk v. McDermott, 185 AD2d 134 (1st Dept. 1992) as upholding the "constitutionality" of New York City's Administrative Code, but no specific constitutional challenge is even mentioned in that opinion, which concerned purely trial evidentiary questions. (Petition at 21)

Petitioners place heavy reliance on Grinberg v. Safir, 266 AD2d 43 (1st Dept. 1999), in which an intermediate appellate court did briefly address some constitutional issues, although not the one in this case. The court made the unremarkable statement that it did not violate due process to seize an automobile for DWI without a pre-seizure hearing. Id. at 44. Consequently, the New York Court of Appeals' dismissal of Grinberg's appeal, 94 NY2d 898, has no significance for this case, although Petitioners attempt to present the order dismissing the appeal as an implicit opinion on the issue in this case. (Petition at 22 n.4)

Nor is the Court of Appeals' decision in conflict with its own precedent in Butler v. Castro, 896 F.2d 698 (2d Cir. 1990), as Petitioners contend. (Petition at 19) Butler v. Castro solely involved a due process issue of inadequate notice. The phrase "constitutionally valid" in the opinion referred only to the notice procedures at issue there. Id. at 699.

Butler v. Castro thus has nothing to do with this case. And, even if it did, it is untrue to assert that "the 25-day time limitation" for filing suit "was held constitutional by it," since a 10-day limit was in effect at the time that case was decided. See Butler v. Castro, 896 F.2d at 701 n.1. The 25-day limit was not put in place until later. See Petition at A59. Besides, the 25-day time limit for initiating a forfeiture action has never been at issue in this case, despite the emphasis placed on it by Petitioners. The centrality of this misapprehension to their Question Presented only accentuates the inappropriateness of this case for a grant of Certiorari.

B. The Second Circuit Decision Properly Applies This Court's Rulings

When the smoke of spurious conflicts is cleared away, it becomes apparent that the Petition for Certiorari is little more than an appeal to this Court to take this case to correct a purported error by a Court of Appeals in applying this Court's precedents in the peculiar factual setting of a single locality. In any case, the Petition's argument is founded on a misapplication of this Court's limited rulings in United States v. $8,850, 461 U.S. 555 (1983) and United States v. Von Neumann, 474 U.S. 242 (1986), and reflects an inability to distinguish the more recent, and pertinent, case of United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

The first case, United States v. $8,850, 461 U.S. 555 (1983), concerned a different issue than the initial hearing issue presented in this case. United States v. $8,850 set down a speedy trial standard for federal forfeiture actions. It did not concern the right to an initial hearing, but only the broad time limits within which a federal forfeiture action must be commenced.

The property claimant there, unlike Respondents, sought to dismiss the case as untimely. This Court held that dismissal was not required because the government had shown diligence and

given reasonable explanations for the 18-month delay. Id. at 569. It applied the four-part speedy trial test for criminal cases of Barker v. Wingo, 407 U.S. 514 (1972). Of course, that speedy trial right coexists in every criminal case with the right to a prompt initial hearing set out in Gerstein v. Pugh, 420 U.S. 105 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (arrestee can challenge detention within 48 hours of arrest). That is the right vindicated in this case in the car seizure context. Respondents sought a declaration of their right to an initial hearing to challenge impoundment. They did not seek dismissal of their forfeiture cases on speedy trial grounds.

The claimant in $8,850 had not used any of the available remedies that would have afforded him an "early judicial hearing." 461 U.S. at 569. Among those remedies was a motion under Federal Rule of Criminal Procedure 41(e) for return of seized property. Id. Rule 41(e) provides for a judicial hearing whenever a person subjected to "deprivation of property" by a federal officer seeks return of the property. There is no analogue to this early opportunity to regain use of property in New York City's Administrative Code forfeiture regime.

It is thus noteworthy that this Court set the speedy trial forfeiture standard in a setting where an early judicial hearing on return of the property was already available. Even if a trial on the ultimate question of legal entitlement to the property was months away, the property owner in a federal action had early access to a judicial forum to regain use of the property during the pendency of the litigation.

To support their argument that United States v. $8,850 rules out any initial hearing where a car is seized for forfeiture, Petitioners quote part of sentence from United States v. Von Neumann, 474 U.S. 242, 249 (1986), which said "[i]mplicit in this Court's discussion of timeliness in $8,850

was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process...." (Petition at 5, 13, 14) The elided end of the sentence states, "to protect Von Neumann's property interest in the car." Id. at 249.

Respondents' ultimate "property interest" in their cars is not the issue in this case; the issue is their right to an initial hearing regarding interim relief. That initial proceeding would not end the case. Von Neumann, like $8,850, did not deal with any such initial hearing regarding interim relief. Neither seizure nor retention of the car was an issue in the case. Von Neumann's car had been released to him within two weeks of its seizure by customs officials. 474 U.S. at 245-46. As did the claimant in $8,850, Von Neumann sought a definitive ruling in his favor based on a timeliness challenge that would terminate the government's claim.

Von Neumann's claim was that the Custom Service's 36-day delay in ruling on his remission petition violated due process and required cancellation of the $3,600 penalty it had imposed for failing to declare his foreign car at the border. This Court rejected his claim, noting that "his right to a forfeiture proceeding meeting the Barker test satisfies any due process right with respect to the car and the money." Von Neumann had not shown that a 36-day delay in the "disposition of his remission petition" deprived him of due process. Id. at 251. The remission petition, which "terminates the dispute," (id. at 249-50 n.8) was subject to the same speedy trial criteria as the trial on the merits.

The initial hearing to contest the custody of the car pending the litigation on the merits -- the only issue in this case -- was simply not an issue in Von Neumann, which dealt with the time limits of the "forfeiture proceeding" that would eventually decide the ultimate issue. Petitioners fail to recognize the salient distinction between the prompt initial hearing to contest the restraint of

property and the ultimate forfeiture proceeding itself. Their assertion that "in seeking a prompt, post-seizure hearing before the resolution of the forfeiture actions, plaintiffs are necessarily challenging the length of time within which the City may constitutionally commence its forfeiture action...." is simply a non-sequitur. (Petition at 18-19) (emphasis supplied)

Any doubt about the dual requirements in a forfeiture case -- a prompt initial hearing to challenge a seizure of property and an ultimate trial on the merits of forfeiture -- was settled by this Court in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). Most of the majority opinion discussed why the initial hearing was required by due process. The hearing's basic purpose " 'is to protect [the] use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property....' " Id. at 53. (citation omitted)

Although Good's property interest at stake ($900 in monthly rent from tenants renting his home) necessitated a hearing before seizure, the Court made clear that even a hearing that was postponed until after seizure must come promptly in order to satisfy due process. "Given the congested civil dockets in federal courts," the Court noted, the "ultimate judicial decision" on forfeiture might not come "until many months after seizure," and " 'would not cure the temporary deprivation that an earlier hearing might have prevented.' " Id. at 56, citing Connecticut v. Doehr, 501 U.S. 1, 15 (1991).

This Court in Good also put the separate questions of the initial hearing and the timeliness of the forfeiture trial in clear relief. The hearing was the "principal question." A "second issue," the Court stated at the outset, was "the timeliness of the forfeiture action." 510 U.S. at 46. It dealt with this "second issue" in a separate section at the end of the opinion. Good, like the money

claimant in U.S. v. $8,850, sought to dismiss the forfeiture action against his property on the grounds that it was untimely. The Court, citing $8,850 among other cases, ruled that dismissal was not required. Id. at 65.

Clearly, the initial hearing and the ultimate proceeding on the merits are separate rights. The contention of Petitioners that $8,850 and Von Neumann rule out an initial hearing and that due process requires only a trial is incompatible with the holding and reasoning of James Daniel Good.

Petitioners attempt to deflect the force of James Daniel Good by arguing that an early hearing is required only where the property seized is real property. (Petition at 22-3) That decision, however, made no such restriction on the right to procedural due process. The nature of the property affects only whether the initial hearing comes before or immediately after seizure, not whether there is a right to an initial hearing to challenge the deprivation. The Court was concerned with the dangers inherent in ex parte seizure of property, not with limiting the opportunity to be heard to a special class of property owners.

"The practice of ex parte seizure," the Court stressed, "creates an unacceptable risk of error." Id. at 55. An initial hearing is the means to correct that error at a meaningful time. The Court explicitly distinguished between "the ultimate judicial action" in the forfeiture action and the "earlier hearing" to challenge the seizure. Id. at 56. The later hearing, coming "many months after the seizure," was insufficient due process because it would not cure the error of the "temporary deprivation that an earlier hearing might have prevented." Id. (citation omitted)

This Court's emphasis on an initial hearing to raise the issue of the custody of any seized property during the pendency of a litigation has ample support in its precedents. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), for example, the Court permitted a state procedure by which

a creditor could sequester disputed property without prior notice only because the debtor was protected by "an adversary hearing which will be immediately available in any event." Id. at 618 (emphasis supplied) On the issue of "possession pending trial" -- the same issue as here -- the Court concluded that it satisfied due process "to permit the initial seizure on sworn ex parte documents, followed by an early opportunity to put the creditor to his proof." Id. at 609.

In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court struck down a Georgia law that allowed garnishment of a bank account pending litigation over a debt. The absence of an early hearing on the deprivation of the bank account violated due process. "Here, a bank account...was impounded, and...put totally beyond use during the pendency of the litigation...without notice or opportunity for an early hearing and without participation by a judicial officer." Id. at 606 (emphasis supplied) Due process required "an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Id. at 607.

As the Court summarized in 1976: "This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing, at which some showing of the probably validity of the deprivation must be made. Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis supplied) (citations omitted)

Petitioners' attempt, therefore, to confine the due process requirements enunciated in James Daniel Good to real property and to rule out an initial hearing for other property seized for forfeiture is contradicted by the language of the decision itself, as well as by this Court's most relevant due process precedents.

CONCLUSION

Petitioners have shown no meaningful conflict among Circuit courts on the post-seizure hearing issue, nor between New York appellate courts and the decision in this case. The Second Circuit's ruling was a correct application of this Court's precedents. For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
May 29, 2003

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